Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO., AND PERMIAN BASIN RADIO CORPORATION, *Appellants*

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY

On Appeal From The Supreme Court of the State of New Mexico

MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE. WITH BRIEF ATTACHED

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MISCELLANEOUS

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The American Optometric Association, Inc. by its attorneys, hereby respectfully moves the Court for leave to file the attached brief as *amicus curiae*, and, in support of this motion, respectfully states as follows:

1. The appellee has given its consent in writing to the filing by the American Optometric Association, Inc. of a brief as *amicus curiae*, but the appellants have withheld their consent, thereby necessitating the filing of this motion.

2. The American Optometric Association, Inc., organized in 1897 and incorporated in 1918 as a non-profit membership organization under the laws of the

State of Ohio, is the national organization representing the profession of optometry, having approximately 11,000 members, which constitutes approximately seventy-five per cent of all eligible practicing optometrists in the country.

The optometrist is the only practitioner especially and exclusively trained to examine and refract the eyes of his patient for defects in vision. The practice of optometry has been defined to be the science and art devoted to the examination of the eyes, the analysis of the ocular functions and the employment of preventive and corrective methods for the relief of visual and ocular abnormalities. The profession of optometry, as it has grown, and as it is now constituted, is a single, complete and unified service, consisting not only of the examination and refraction of the eyes, but also of the prescribing and furnishing of eyeglasses or vision training, or both, as may be found necessary by the optometrist.[1]

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[1] For background purposes, it is helpful to distingnish the optometrist from the ophthalmologist, the oculist, and the optician. The ophthalmologist is a physician who has taken post graduate work in the eye and has passed examinations given by the American Board of Ophthalmology. He is specially trained to perform eye surgery and to treat diseases of the eye. He is accredited and is a diplomate in ophthalmology.

The oculist is also a physican, who, on his own, has decided to specialize in the eye. He usually practices, in addition, the specialties of the ear, nose, and throat. The ophthalmologist and the oculist usually write prescriptions for eyeglasses; they do not ordinarily fill the prescriptions or provide the glasses themselves.

The optician, sometimes called a dispensing optician or an ophthalmic dispenser, is a mechanic who fills the prescriptions for eyeglasses written by the ophthalmologist or oculist. The optician is not qualified to examine the eye or to write prescriptions for eyeglasses.

In the past fifty years, the public need for the best obtainable visual care and for the highest professional standards in the practice of optometry has greatly increased. Tolerances in a number of industries are measured with far greater accuracy than was formerly the case, making greater demands on human vision. The motor vehicle, car or truck, is a dangerous instrumentality in the hands of a driver with poor vision. The enormous increase in the use of the public highways demands more effective use of the police power in this area both for the better visual health of the citizen and for the public safety.

Devoted from its inception to the protection and care of the vision of the public, the American Optometric Association, Inc., seeks to elevate the standards and practice of the profession of optometry, so that the public health, safety, and welfare will be protected from the untrained, the unqualified, the unethical, the unprofessional, and the charlatan.

3. The Association has been, and continues to be, interested in legislation and litigation affecting the practice of the profession of optometry and the field of visual care. It constantly guides and counsels toward greater professional status, attainment, and achievement, through better education and through the enactment of salutary legislation for the public and the profession.

Hence, the American Optometric Association, Inc., has a vital interest in the matters asserted before the Court in this case. We support the decision in this case of the Supreme Court of New Mexico. But our interest in doing so is not believed to be identical with that of the appellee. In rejecting appellants' contention of

a violation of the Commerce Clause, the Supreme Court of New Mexico distinguished New Mexico's provision against price advertising of eyeglasses from an absolute prohibition of all advertising of eyeglasses. Affirmance here on the basis of any such distinction would make doubtful the validity of an absolute prohibition on such advertising.[2] We believe the absolute prohibition better calculated for protection of health in visual care and strengthening of the standards of the profession of optometry. So we seek to defend New Mexico's partial advertising restriction on broader grounds than were utilized in the court below.

4. Our interest goes beyond that. The appellants urge the invalidity of the decision below on grounds of federal preemption, violation of the Commerce Clause and violation of the First Amendment as included in the Fourteenth. The American Optometric Association, Inc., as a national organization, is particularly equipped to defend against these contentions of federal law, and, in aid of the Court's function of balancing state and federal interests, to point up the deleterious effect of a reversal here on the laws of many states besides New Mexico.

5. The American Optometric Association, Inc. participated as *amicus curiae* in this Court in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, not only filing a brief, but also arguing orally before the Court. The Association is familiar with that proceeding and with the briefs and record in that case and is particularly well

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[2] See, for example, the Oklahoma provision (Okla. Stats. Ann., Title 59, Sec. 943) against all such advertising which was upheld, at least against due process attack, in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483.

equipped to set forth an evaluation of the impact of the decision in *Williamson* on the interstate commerce questions presented here.

For the foregoing reasons, therefore, it is respectfully submitted that the motion of the American Optometric Association, Inc. for leave to file the attached brief as *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION, INC. AS AMICUS CURIAE

THE INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION, INC.

The interest of the American Optometric Association, Inc. is set forth in the Motion of the American Optometric Association, Inc. for Leave to file this brief as *amicus curiae, supra*, pp. 1-5.

STATUTE INVOLVED

The enforcement provisions of the New Mexico statute regulating the practice of optometry, Section 67-7-13 of the New Mexico Statutes Annotated, 1953 Compilation, are set forth in the Appendix.

STATEMENT

This proceeding is here on appeal from a judgment (R. 52-53) of the Supreme Court of New Mexico which upheld the validity of an injunction (R. 21) granted by the District Court of Lea County, New Mexico. The injunction, so far as is material here, was granted in favor of the appellee, New Mexico Board of Examiners in Optometry (hereinafter called New Mexico) and against the appellants, Agnes K. Head, d/b/a Lea County Publishing Co., and Permian Basin Radio Corporation (hereinafter called "Head" and "Permian," respectively). The injunction enjoined Head and Permian from accepting or publishing within the State of New Mexico price advertising of eyeglasses from one Abner Roberts (hereinafter called "Roberts").[1]

The facts of record, albeit somewhat thin, are not in dispute. The State of New Mexico has enacted extensive statutes which provide a comprehensive system for the regulation of the practice of optometry. New Mexico Statutes Ann., Secs. 67-7-1 to 67-7-14. One subsection of New Mexico's statutory system forbids,

[1] The injunction (R. 21) and the New Mexico statute which it enforced (see the Appendix) actually state broader and more inclusive terms of forbidden advertising relating to eyeglasses than is necessarily implied by the short-hand reference "price advertising of eye glasses." However, in this case nothing depends on the difference between actual wording and the short-hand reference we use.

and provides criminal penalties for, price advertising of eyeglasses. New Mexico Statutes Ann., Sec. 67-7-13 (m) which is set forth in the Appendix.

We turn now to the community of Hobbs, New Mexico, and its surrounding market area. Hobbs is close to the Texas state line (R. 31, 38). Roberts practices optometry in Texas a few miles east of Hobbs, and just across the Texas state line. He holds a license from New Mexico to practice optometry in New Mexico (R. 2, 4, 7, 18). Permian, a radio station resident and operated in Hobbs, serves Hobbs and its surrounding area lying partly in New Mexico and partly in Texas (R. 2, 7, 18, 28). Head, a resident of Hobbs, owns a weekly newspaper called the "Hobbs Flare" which is published in Hobbs. The "Hobbs Flare" has a Second Class Mailing Permit. The "Hobbs Flare" has a "circulation" in the marketing area around Hobbs, both in New Mexico and Texas. It also has a "circulation" in thirteen other states and the District of Columbia. The extent of neither "circulation" appears in the record (R. 2, 4, 18, 29, 37).

Roberts, over a period of time, placed price advertisements of his eyeglasses with Head in Hobbs, which Head published in the "Hobbs Flare," and with Permian in Hobbs, which Permian broadcast over its broadcast facilities located in Hobbs (R. 2, 3, 5, 7, 18-19).

New Mexico sued to enjoin Head, Permian, and Roberts from publishing and broadcasting Roberts' price advertisements of eyeglasses, and alleged that such publication and broadcasting, unless restrained, would continue in violation of the New Mexico prohibition of price advertising of eyeglasses (R. 1-3). Head and

Permian, so far as is pertinent here, defended solely on constitutional grounds (R. 4, 7). Roberts did not appear, but the state trial court enjoined Head and Permian "from accepting or publishing within the State of New Mexico" price advertising from Roberts (R. 21). In doing so, the Court concluded that Head, Permian, and Roberts were all engaged in violation of the New Mexico price advertising prohibition, and that Head and Permian were "aiding and abetting in, and encouraging" such violation (R. 19). The Supreme Court of New Mexico upheld the injunction against Head and Permian (R. 52-53). They appealed to this Court.

SUMMARY OF ARGUMENT

I. Preemption

The Federal Communications Act itself does not preempt New Mexico's action. Neither does any required uniformity in the interstate commerce field. Many decisions of this Court, validating state police power action, have led to less uniformity in comparable fields of interstate commerce, than would affirmance here. Finally, there is no action by the Federal Communications Commission that covers what New Mexico has done. If there were such action by the Federal Communications Commission, it would be in the protection of interests different from the interest which New Mexico seeks to protect; hence, there would be no preemption.

II. Interstate Commerce

New Mexico, in an indisputably valid exercise of her police power so far as the Due Process Clause is concerned, has enacted a general statute applicable equally

and without discrimination to all within her borders, whether engaged in interstate commerce or not. The injunction in enforcement of the general statute is directed solely against residents of New Mexico, and enjoins action only within New Mexico. No loss to interstate commerce is shown to result from the injunction. Such action by New Mexico is well within the decisions of the Court upholding state police power action affecting interstate commerce, especially where as here, the interstate commerce involved is essentially local, and the State is attempting to solve a local problem.

III. First Amendment

Nothing is involved in this case except purely commercial advertising. Such advertising is not entitled to First Amendment protection, at least in the absence of any design to eliminate expression of opinion by advertising media. Since there is no First Amendment protection, any issue as to prior restraint is pointless. If the First Amendment had some application here, the balancing of interests would favor New Mexico; for the interest of appellants is only in advertising revenue to which no injury has been shown, whereas the interest of New Mexico, and other states which have similar optometric statutes, is in the health of their citizens. It is late in the day to urge prior restraint against advertising restrictions directed to the practices of the quack and charlatan. Compare the familiar cease and desist orders of the Federal Trade Commission. Finally, the fact that the appellants in other aspects of their business are engaged in the dissemination of opinion does not give them a right to be free from state regulation directed to solution of local problems.

ARGUMENT

I.

NEW MEXICO'S PROHIBITION OF PRICE ADVERTISING OF EYEGLASSES AS APPLIED HERE IS NOT PREEMPTED BY THE FEDERAL COMMUNICATIONS ACT

A. The Setting in Which the Question of Preemption is Presented

In prohibiting price advertising of eyeglasses New Mexico has, as against the due process clause, validly exercised its police power in protection of the health of its citizens. So much is indisputable. See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (prohibition of all advertising of eyeglasses held valid); *Semler* v. *Dental Examiners*, 294 U.S. 608 (prohibition of price advertising by dentists held valid); and *Roschen* v. *Ward*, 279 U. S. 337 (prohibition of sale of eyeglasses where no licensed physician or optometrist in attendance held valid). Such a prohibition as New Mexico's is "rationally related to the public health and welfare" (*Williamson* at p. 489); and there is "no constitutional reason why a State may not treat all who deal with the human eyes as members of a profession who should use no merchandising methods for obtaining customers" (*Williamson* at p. 490). With respect to price advertising in a professional field, the legislation of New Mexico was, as this Court held on the same point, in *Semler*, at p. 613, "entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatements." The general rule on price advertising of eyeglasses prohibits what was observed by this Court in *Semler* at p. 612 to be generally "the practice of the charlatan and the quack."

New Mexico's statute provides criminal penalties of fine and imprisonment for its violation. See Section 67-7-13 in the Appendix. But in the absence of Roberts, New Mexico enforced its price advertising prohibition against Head and Permian by injunction rather than by fine and imprisonment.

The Congress could prohibit a state from doing what New Mexico has done, that is to say, the Congress could have prohibited the issuance of a state court injunction against the radio station there. But Congress has made no such express prohibition. The question here is whether, nevertheless, Congress, by reason of the Federal Communications Act, 47 U.S.C. 151 ff., has preempted the field of radio broadcasting so as to supersede New Mexico's prohibition as applied to radio.[2] To a determination of this question of preemption, it is immaterial that Roberts is a resident of Texas rather than New Mexico. Preemption would forbid the application of New Mexico's prohibition to the radio advertising of violators resident within her own borders. And it would appear to make no difference whether the State seeks enforcement by injunction against the resident advertiser, or by injunction against the resident radio broadcaster, or by criminal prosecution against either or both. If preemption were to prevent the State from making the advertising illegal for radio

[2] The jurisdictional statement of Permian did not present this question (R. 57). With respect to whether the injunction here has conflicted with Permian's duties as a broadcaster or with the duties of the Federal Communications Commission as administrator of the Federal Communications Act, it is also of some significance that until invited by this Court to do so, the Commission and the United States did not seek to appear in this litigation to urge preemption. See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 188.

broadcasting, it would seem to follow that the State in view of the Supremacy Clause could not punish or restrain such advertising. This is the context of the preemption question from the State or local view point.

From the national viewpoint, it is relevant to the context here that we are not concerned with the field of subversion of the national sovereignty, where the national interest is at its greatest, compare *Pennsylvania* v. *Nelson*, 350 U.S. 497.[3] Neither are we concerned with the field of foreign relations where state power is "at its narrowest limits." See *Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740, 749, and compare *Hines* v. *Davidowitz*, 312 U.S. 52. We deal here with the field of interstate commerce. And in that field, this Court has recognized, at least since *Cooley* v. *Board of Port Wardens*, 12 How. 299, that there is much room for the valid application to interstate commerce of general legislation passed by a State in the exercise of its police power—even when there is federal legislation with respect to the particular type of interstate commerce affected. See the cases cited at pp. 16-18, *infra*.

Finally, as to context, the validity of New Mexico's price advertising prohibition under the Commerce Clause (Point II, *infra*) and the First Amendment (Point III, *infra*) is assumed for the purposes of the discussion of the preemption point. If the Commerce Clause alone forbade New Mexico's action, discussion

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[3] But in the closely related field of defense of the national sovereignty, a State is not preempted from punishing speeches against army enlistments which are already made criminal under federal law. *Gilbert* v. *Minnesota*, 254 U.S. 325; and cf. *Halter* v. *Nebraska*, 205 U.S. 34 (at least in the absence of federal legislation, a State may validly punish the use of the national flag for advertising purposes).

of the preemption question would be pointless; and if the First Amendment forbade such action, federal preemption would be impossible.[4]

B. The Federal Communications Act, Itself, Does Not Preempt New Mexico's Action

With respect to radio and television, the Act sets up a licensing system in which the Federal Communications Commission (hereinafter called the Commission) is empowered to grant, renew, revoke, or modify licenses for broadcasting and broadcasting equipment, and to approve or disapprove transfers of such licenses, all under a general standard of the public interest, convenience or necessity. In cases not concerned with preemption, the Court has referred to this licensing system as a "unified and comprehensive regulatory system" for radio.[5] See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137; *Scripps-Howard Radio* v. *Com'n.*, 361 U.S. 4, 6; and *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 213. Those statements, which are "mere generalities" in the present context, are urged by the appellant Permian, (but not by the United States) to show preemption by the Act. In refutation of that aspect of appellant's argument it is sufficient to quote Mr. Justice Frankfurter, dissenting but not on this point in *Hill* v. *Florida*, 325 U.S. 538, 552:

> A survey of the scores of cases in which the claim has been made that State action cannot survive some contradictory command of Congress leaves

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[4] The appellants cannot be right on both the First Amendment and preemption questions. They have to be wrong on at least one of them.

[5] Brief for the appellants, p. 25.

> no doubt that State action has not been set aside on mere generalities about Congress having "occupied the field" or on the basis of loose talk instead of demonstration about "conflict" between State and federal action. We are in the domain of joint and practical affairs, and this Court has not stifled State action unless what the State has required, in the light of what the Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

There is nothing specific in the Act itself which conflicts with New Mexico's statute, and none is claimed by the United States or by the appellants. In the absence of a direct conflict, Federal codes of regulation, fairly comparable in unity and comprehensiveness to the Federal Communications Act, have not preempted state police power action applicable to any aspect of interstate commerce—whether it be to interstate railroads generally subject to the "broad sweep"[6] of the Interstate Commerce Act,[7] or to interstate taxicabs and

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[6] See *Kelly* v. *Washington*, 302 U.S. 1, 13.

[7] Despite the Interstate Commerce Act the Court has upheld state statutes requiring that railroad passenger cars be heated and guard post placed on railroad bridges, *N.Y., N.H. & H.R.R. Co.* v. *New York*, 165 U.S. 628; that every railroad cause three of its regular passenger trains to stop each way daily at every village with inhabitants over three thousand, *Lake Shore & Michigan Southern R.R. Co.* v. *Ohio*, 173 U.S. 285; that railroad trains limit their speed within cities to six miles per hour, *Erb.* v. *Morash*, 177 U.S. 284; that locomotive headlights meet a prescribed standard, *Atlantic Coast Line R.R.* v. *Georgia*, 234 U.S. 280; that railroad trains carry prescribed "full crews," *Chicago, Rock Island & Pacific Ry.* v *Arkansas*, 219 U.S. 453, and *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas*, 240 U.S. 518; that a railroad eliminate grade crossings, although its solvency be imperilled, *Erie R.R. Co.* v. *Public Utility Commissioners*, 254 U.S 394; and that all the railroads entering a city build a union passenger station, *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U.S. 380, 391.

interstate travel bureaus subject to the federal Motor Carriers Act,[8] or to interstate tugs not within the lower tonnage and motor power limits of federal ship safety inspection laws,[9] or to interstate ships which are subject to the "extensive and comprehensive set of controls over ships and shipping" provided by Congress,[10] or to licensing of customs-brokers in foreign commerce with respect to the identical business for which they are already licensed under federal statute,[11] or to interstate pipelines generally subject to the federal Natural Gas Act,[12] or to the labeling of products transported in interstate commerce and subject to the labeling requirements of the federal Pure Food and Drug Act,[13] or to the interstate transportation of animals subject to the interstate transportation requirements of the federal Animal Industry Act or the federal Cattle Contagious Disease Act,[14] or to the labor relations of interstate employers generally subject to the National Labor Relations Act and the federal Labor Management Rela-

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[8] *Buck* v. *California*, 343 U.S. 99 (county requirement of a driver's permit held valid as applied to taxicab merely going through the county on trip in interstate and foreign commerce); *California* v. *Zook*, 336 U.S. 725 (state prohibition of operation of travel bureau without I.C.C. permit upheld).

[9] *Kelly* v. *Washington*, 302 U.S. 1.

[10] *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440.

[11] *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.

[12] A state may regulate the direct sales of an interstate pipeline to an industrial consumer. *Panhandle Co.* v. *Michigan Com'n.*, 341 U.S. 329; *Panhandle Pipe Line Co.* v. *Com'n.*, 332 U.S. 507.

[13] *Savage* v. *Jones*, 225 U.S. 501.

[14] *Reid* v. *Colorado*, 187 U.S. 137; *Mintz* v. *Baldwin*, 289 U.S. 346.

tions Act,[15] or to the interstate transportation of raisins regulated by a state stabilization program which could be suspended by a federal stabilization program under the Agricultural Marketing Agreement Act.[16]

It should be observed that in many of the foregoing illustrations of valid state action applicable to interstate commerce despite federal codes of regulation, state codes and federal codes covered the same basic subject, as, for example, transportation, ship inspection, gas transmission, product labeling, labor relations, and crop stabilization. Here, there is even less reason for finding preemption by the Federal Communications Act, for the federal act and New Mexico's statute are not directed to the same basic subject. See *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 206; and cf. *Guss* v. *Utah Labor Board*, 353 U.S. 1, 6; *Pennsylvania* v. *Nelson*, 350 U.S. 497; and *Hines* v. *Davidowitz*, 312 U.S. 52, 61. The State act is directed to the regulation of optometry. The federal act is directed to the regulation of radio, and contains no regulation of advertising on radio that is generally or specifically applicable here.[17] By separate and specific amendments, the Con-

[15] Contrast *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245, and *Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740, where the Court found no conflict between federal and state regulation, with *Bethlehem Co.* v. *State Board*, 330 U.S. 767, *Guss* v. *Utah Labor Board*, 353 U.S. 1, and *Hill* v. *Florida*, 325 U.S. 538, where the Court did find such conflict.

[16] *Parker* v. *Brown*, 317 U.S. 341.

[17] Section 303(m) authorizes suspension of a radio operator's license for false or deceptive signals, but by its own terms it is not applicable to station licenses. Section 326 contains a prohibition of free speech censorship by the Commission of program content.

gress has required announcements of the fact of payment to a broadcaster for a particular program (Section 317), and has imposed restrictions on quiz programs and "payola" (Sections 508 and 509). And by separate additions to the Criminal Code, Congress has prohibited fraud by radio and television, 18 U.S.C. Sec. 1343, and the broadcasting of lottery information, 18 U.S.C. Sec. 1304. The piecemeal approach shown by these individual actions of Congress, all of which affect radio advertising without touching optometric price advertising, rationally suggests that the Federal Communications Act does not preempt New Mexico's exercise of its police power over optometric price advertising by radio.

In any event, the decisions of the Court foreclose any contention that the Federal Communications Act preempts the field of radio so as to invalidate *non-conflicting* state action under state police power which affects radio broadcasting. *Regents* v. *Carroll*, 338 U.S. 586 (The Federal Communications Commission finds a contract entered into by a radio broadcast licensee to be not in the public interest and refuses renewal of its license unless the contract is repudiated; nevertheless, a state court judgment for the damages consequent upon the licensee's repudiation *held* valid); *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (The Federal Communications Commission approves the transfer of licensed radio broadcasting facilities from lessor to lessee as in the public interest; nevertheless state court order compelling the return of the licensed facilities to the lessor because of fraud *held valid*); see *Fisher's Blend Station* v. *Tax Com'n*, 297 U.S. 650, 656; and cf. *United States* v. *R.C.A.*, 358 U.S. 334 (Approval by the Federal Communications Commission of an ex-

change of television stations by broadcast licensees as being in the public interest does not bar prosecution for a resulting antitrust violation).[18]

C. No Dominant Federal Interest in Uniform Regulation of Radio Broadcasting Advertising Content Preempts New Mexico's Action

The United States urges (Brief for the United States, pp. 24-27) that a dominant federal interest in uniform regulation of radio advertising preempts the application of New Mexico's statute to radio advertising. Congress has declared no such dominant federal interest in uniform regulation of radio advertising. In its absence, the suggestion of such a dominant federal

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[18] In accord is *Kroeger* v. *Stahl*, 248 F(2d) 121 (C.A. 3, 1957) (Approval by the Federal Communications Commission of a particular site for the transmitter of a mobile radio station licensee does not permit violation of local zoning ordinance which classifies the approved site as residential). *Farmers Union* v. *WDAY*, 360 U.S. 525; *Allen B. Dumont Laboratories* v. *Carroll*, 184 F(2d) 153 (C.A. 3, 1950), and *Lamb* v. *Sutton*, 164 F. Supp. 928 (M.D. Tenn. 1958), aff'd. 274 F(2d) 705 (C.A. 6, 1960), cert. den. 363 U.S. 830, emphasize the point we make in the text. In those cases, the courts found preemption of state action because of conflict with a specific provision of the Federal Communications Act, namely, Section 315 which forbids censorship of the speeches of political candidates (the *Farmers Union* and *Lamb* cases), and Section 326 which forbids free-speech censorship of programs (the *Allen B. Dumont Laboratories* case). The dictum in *Allen B. Dumont Laboratories*, 184 F(2d) at p. 455 that "it was the intention of Congress to occupy the television broadcasting field in its entirety" cannot be squared with the decisions of this Court cited in the text unless the dictum is qualified by the context in which it was stated.

interest in a field of interstate commerce is novel but untenable. The United States cites no decision which held preemption on the ground of such a dominant federal interest in interstate commerce. Instead, the United States argues that radio advertising cannot be changed as it crosses a state line, so diverse state statutes on advertising will burden it, and hence a dominant federal interest in uniformity must be assumed.[19] The first clear answer to that argument lies in the very nature of all interstate commerce, including radio advertising. It is always impossible, impractical or difficult for any kind of commerce (not radio alone) to change as it crosses a state line. It is so with interstate railroads, interstate taxicabs, interstate pipelines transmitting gas, and interstate shipments of labeled products. Nevertheless state regulation which does not conflict with Federal regulation is not preempted. See the many cases cited *supra* at pp. 16-18; and, since the argument of the United States is essentially one of violation of the Commerce Clause, see also our Point II, *infra*.

Second, the United States writes in the large of the "incalculable mischief and confusion" arising from a "jumble of [state] directives" relating to advertising. But only the New Mexico statute is cited, together with an erroneous assertion that "Texas does not impose

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[19] So far as we can understand the Brief for the United States, its argument on dominant federal interest in uniformity confuses preemption with violations of the Commerce Clause. See Brief for the United States, pp. 26-27. Nevertheless, we respond to the argument at this point in our text.

restrictions on advertising by optometrists." Brief for the United States, p. 25. Decision cannot be predicted on such a showing or lack of showing of generally asserted conflicts or diversities. See *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 448; *California* v. *Zook*, 336 U.S. 725, 736; *Panhandle Pipe Line Co.* v. *Com'n*, 332 U.S. 507, 523; and *Hill* v. *Florida*, 325 U.S. 538, 552 (opinion of Frankfurter, J., dissenting but not on this point).

Third, state regulation of optometric price advertising is in fact fairly uniform. Like New Mexico, thirty-one other states have proscriptions on price advertising of eyeglasses and other optometric materials. Like

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[20] As pointed out by the appellants in their brief at page 9, Texas prohibits:

> ..... any statement or advertisement concerning opthalmic lenses, frames, eye-glasses, spectacles or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning. (*Vernon's Texas* Civil Statutes, Art. 4566g)

[21] Ark. Stat. sec. 72-813 (1957 Repl.); Cal. Ann. Code, Bus. and Professions, sec. 3129 (1962); Del. Code Ann. tit. 24, sec. 2113 (1953); Fla. Stat. Ann. sec. 463.11, 463.14; Hawaii Rev. Laws sec. 68-9 (1955); Ind. Stat. sees. 63-1018a, 63-1019; Ky. Rev. Stat. sec. 320.300; La. Rev. Stat. sec. 34:1063; Mass. Gen. Laws Ann. ch. 112, sec. 73, A.; Mich. Laws Ann. sec. 14.648 (1956); Minn. Stat. Ann. sec. 148.57 (3); Mo. Rev. Stat. sec. 336.110 (Vernon); Mont. Rev. Codes sec. 66-1302 (1947); Neb. Rev. Stat. sec. 71-148 (1958); Nev. Rev. Stat. sec. 636.300; N.H. Rev. Stat. sec. 327:20; N.J. Stat. Ann. sec. 45:12-11; N.M. Stat. Ann. sees. 67-7-9, 67-7-13; N.C. Gen. Laws sec. 90-124; N. Dak. Cent. Code sec. 43-13-29 (absolute prohibition); Okla. Stat. tit. 59, sees. 585, 943 (1961); Ore. Rev. Stat. sees. 683.140 (3), 683.340 (6); Pa. Stat. Ann. tit.

Texas (see fn. 20), forty-three other states have proscriptions of false, misleading, fraudulent, or bait advertising of eyeglasses and other optometric materials. The difference between the two types of prohibitions is not significant from a broadcaster's viewpoint. Prohibi-

63, sec. 237 (Purdon); R.I. Gen. Laws sec. 5-35-22; S.C. Code of Laws, sec. 56-1075; S. Dak. Code sec. 27.0707 (1960 Supp.); Tenn. Code Ann. secs. 63-815, 63-822, 63-1404; Utah Code Ann. sec. 58-16-14 (1953); Va. Code secs. 54-388, 54-396, 54-398.23 (1950); Wash. Rev. Code Ann. secs. 18.53.140, 18.34.090; W. Va. Code sec. 2937 (1961); Wisc. Stat. Ann. secs. 153.08, 153.10; Wyo. Stat. sec. 33-301.

Ala. Code, tit. 46, sec. 214; Ark. Stat. sec. 72-815 (1957 Repl.); Cal. Ann. Code, Bus. and Professions sec. 3104 (1962); Colo. Rev. Stat. sec. 102-2-17 (1953); Conn. Gen. Stat. sec. 20-133 (d) (1958); Del. Code Ann. tit. 24 sec. 2113 (1953); Fla. Stat. Ann. sec. 463.11; Ga. Code Ann. sec. 84-3507; Hawaii Rev. Laws, sec. 68-9 (1955); Idaho Code sec. 54-1512 (1948); Ill. Ann. Stat. Ch. 91, sec. 105.13 (Smith-Hurd); Ind. Stat. sec. 63-1018a (Burns 1961); Iowa Code Ann. sec. 147.55; Kan. Gen. Stat. sec. 65-1506, 1510; Maine Rev. Stat. Ch. 76, sec. 16 (1954); Md. Ann. Code Art. 43, sec. 389 (1957); Mass. Gen. Laws Ann. Ch. 112, sec. 73 (A); Mich. Laws Ann. sec. 14.648 (1956); Mo. Rev. Stat. sec. 336.110 (Vernon); Mont. Rev. Codes sec. 66-1312 (1947); Neb. Rev. Stat. sec. 71-147, 71-148 (1958); Nev. Rev. Stat. sec. 636.300, 636.380; N.H. Rev. Stat. sec. 327:20; N.J. Stat. Ann. sec. 45:12-11; N.M. Stat. Ann. sec. 67-7-9; N.Y. Education Law sec. 7108 (1); N.C. Gen. Laws sec. 90-124; N. Dak. Cent. Code sec. 43-13-22; Ohio Rev. Code sec. 4725.41 (Baldwin); Okla. Stat. tit. 59, sec. 585 (1961); Ore. Rev. Stat. sec. 683.140 (3); Pa. Stat. Ann. tit. 63, sec. 237 (Purdon); R.I. Gen. Laws sec. 5-35-19 (1956); S.C. Code of Laws secs. 56-1075, 56-1077; S. Dak. Code sec. 27.0707 (1960 Supp.); Tenn. Code Ann. secs. 63-815, 63-822; Texas Civil Stat. Art's. 4563, 4465g; Utah Code Ann. sec. 58-16-14; Vt. Stat. Ann. tit. 26, sec. 1695; Wash. Rev. Code Ann. secs. 18.53.100, 18.53.140, 18.34.090; W. Va. Code sec. 2937 (1961); Wisc. Stat. Ann. sec. 153.10; Wy. Stat. secs. 33-300, 33-301.

tions of false, misleading or bait advertising may require proof of falsity in fact for successful prosecution,[23] whereas flat prohibitions of price advertising will not. The statutes of all of these states are directed in the interest of the public health against the same evil "the [price] practice of the charlatan and the quack" in the field of optometry. *Semler* v. *Dental Examiners*, 294 U.S. 608, 612. The presence of all these state statutes provides but another reason for not finding preemption here, where, at a minimum, none clearly exists. *Halter* v. *Nebraska*, 205 U.S. 34, 39;[24] see *Silz* v. *Hesterberg*, 211 U.S. 31, 40, and comment thereon in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 525.

Fourth, if and when the Congress finds diversity in the field with which we are concerned, and finds diversity undesirable, it will preempt such diversity by enactment of such uniform rule as it deems beneficial. If and when Congress does so, almost surely it will not be a rule leaving radio free to accept advertisements and newspapers not. In the final analysis, preemption

[23] See e.g. *Shannon* v. *Rogers*, 159 Tex. 29; 314 S.W. (2) 810 (1958).

[24] In *Halter*, the Court noted that more than half of the states had statutes "substantially similar in their general scope to the Nebraska statute" there under constitutional attack; and stated "that fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States." The Nebraska statute was upheld.

Contrast the opinions of the Court in *Near* v. *Minnesota*, 283 U.S. 691, 719, *and Grosjean* v. *American Press Co.*, 297 U.S. 233, 250. In each of those cases, a state statute was held invalid with the comment that the uniqueness of the statute in our history was "significant."

rests on the intent of Congress. *Guss* v. *Utah Labor Board*, 353 U.S. 1, 10. And preemption here can only mean a rule on advertising which discriminates in favor of Permian against Head, or to put it in its broadest terms, in favor of radio and television against newspapers and all other forms of competing advertising media. Entirely apart from the Due Process difficulties that would arise from such a rule if Congress were to adopt it, there is nothing here to suggest that Congress intended to adopt a rule so drastic in its diverse impact on competing advertising media.

D. There is Nothing in the Administration of the Federal Communications Act by the Commission Which Preempts New Mexico's Action.

The arguments of the United States (its brief, pp. 12-23) and Permian (Brief for the appellants, pp. 27-28) appear to be premised upon the thought that New Mexico's law is preempted so long as the Commission has some kind of power over radio advertising and takes some kind of action pursuant to it. The thought is plainly erroneous. The rules of judicial adjudication pertaining to preemption of state laws by federal agency action are much more precise, and extremely stringent. "In a situation like the present, where" Permian's "enterprise touches different and not common interests between Nation and State" the "task" of the Court "is that of harmonizing these interests without sacrificing either." See *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 207. Preemption "must be clearly manifested." See *California* v. *Zook*, 336 U.S. 725, 733. So it is that preemption requires a direct and

positive conflict between federal and State action.[25] As the Court summed it up in *Kelly* v. *Washington*, 302 U.S. 1, 10:

> The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

And more recently the Court in rejecting a contention of preemption stated (*Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 446):

> To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflict between state and federal regulation where none clearly exists.

The materials on Commission administration cited by Permian and the United States do show that the Commission has something to do with the advertising content of radio programs. However, since they proceed on an erroneous premise, the very materials they cite also show that Commission action does not conflict with New Mexico's.

The Commission has no power to order Permian or any other broadcaster to accept or reject any advertise-

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[25] The decisions start as early as *Simot* v. *Davenport*, 22 How. 227, 243, and continue through *Missouri, K. & T. R. Co.* v. *Haber*, 169 U.S. 613, 623; *Gilvary* v. *Cuyahaga Valley R. Co.*, 219 U.S. 57, 60; *Townsend* v. *Yeomans*, 301 U.S. 441, 454; *Kelly* v. *Washington*, 302 U.S. 1, 10; *California* v. *Zook*, 336 U.S. 725, 729; *Panhandle Co.* v. *Michigan Com'n*, 341 U.S. 329, 336; *Buck* v. *California*, 343 U.S. 99, 102; to *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 446.

ment. "The Commission is given no supervisory control of the programs; of business management or of policy." *Commission* v. *Sanders Radio Station*, 309 U.S. 470, 475. The Commission cannot regulate "the licensee's business as such." *Regents* v. *Carroll*, 338 U.S. 586, 598. Other than the withholding of a license, it has no sanction to apply against programming, whether advertising or otherwise. See *Regents* v. *Carroll*, 338 U.S. 586, 598.[26]

As the Commission itself has always recognized, its power over programming content is confined to determination of the question whether the grant of a license would serve the statutory standard of "public interest, convenience and necessity." So the Commission has succinctly advised the Congress:

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[26] The United States cites provisions of the Federal Communications Act (P. 10 of its brief) which in other connections, but not programming, authorize the Commission to issue cease and desist orders, Section 312(b), and to exact monetary forfeitures, Section 503. The United States does not contend that those provisions are applicable to programming, whether advertising or otherwise. But in the absence of this explanatory note, the impression conveyed by their citation might be unintentionally misleading.

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215, the Court stated that the Act "puts upon the Commission the burden of determining the composition of the [radio] traffic." The relevant context of that statement was:

> If [the Act] puts upon the Commission the burden of determining the composition of the traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

Plainly, the Court was speaking of selection of licensees and not selection of programs. Cf. Brief for the United States at p. 13.

> The Commission has no authority to censor any program or programs, including advertising copy. The Commission's authority, therefore, with respect to the matter is limited to considerations of applications for renewal of license. (*Broadcasting of Programs, Advertising Alcoholic Beverages*, 5 Pike & Fischer, *Radio Regulations* 593, 594)

The Commission has uniformly advised its licensees to the same effect. *Commission Policy on Programming*, 20 Pike & Fischer, *supra*, 1901, 1910 (1960); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1255. And such is its rule of decision in adjudication of cases. See, e.g., *In re Petition of the New Jersey Council of Christian Churches*, 14 F.C.C. 365, 366 (1949); *Application of the Northern Corp. (WMEX)*, 12 F.C.C. 940, 944; *In re McGlashan*, 2 F.C.C. 145, 152.

Entirely apart from the lack of power which it recognizes, the Commission considers the task of deciding what advertising or other program material a licensee should accept or reject as an "intolerable and impossible burden" for the Commission. See *Application of the Northern Corp. (WMEX)*, 12 F.C.C. 940, 944; *Commission Policy on Programming*, 20 Pike & Fischer *supra*, 1901, 1908 (1960); and *Note on the Regulation of Advertising*, 56 Columbia Law Rev. 1048, 1074.

Hence, Permian, as a licensee, has the discretion and the responsibility of selecting or rejecting advertising material for its broadcasts. *Commission Policy on Programming*, 20 Pike & Fischer, *supra*, 1901, 1912 (1960); *In re Petition of the New Jersey Council of Christian Churches*, 14 F.C.C. 365, 366 (1949); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1255; *WREC Broadcasting Service*, 10 Pike & Fischer, *supra*, 1323, 1350 (1955); *In re McGlashan*, 2 F.C.C.

145, 152. The Commission holds that Permian, as a station licensee, "continues to bear legal responsibility for all matter broadcast over his facilities." *Commission Policy on Programming, supra* at p. 1913.

When Permian's license comes up for renewal, the Commission will adjudicate whether renewal would serve "the public interest, convenience and necessity." That sole, statutory standard for the Commission's adjudication is a "criterion . . . as concrete as the complicated factors for judgment in such a field permit." See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. Many factors other than programming are considered, such as whether the licensee is financially, technically, and legally qualified, whether the licensee's operation is efficient, and whether the licensee on the whole has conducted his station in his own interest rather than in the interest of his listening public. See e.g., *KFKB Broadcasting Ass'n.* v. *Federal Radio Commission*, 47 F(2d) 671 (C.A. D.C., 1931); *The Farmers & Bankers Life Ins. Co. (KFBI)*, 2 F.C.C. 455, 457; *Oak Leaves Broadcasting Station, Inc. (WGES)*, 2 F.C.C. 298, 299; *Knickerbocker Broadcasting Co., Inc. (WMCA)*, 2 F.C.C. 76, 77; *WSBC Incorporated*, 2 F.C.C. 293, 294. A particular program, advertising or otherwise, which is questionable, may be considered but only in the light of whether the licensee in his overall programming has exercised good faith and a reasonable judgment in serving the needs, tastes and desires of the listening public in the community or area served. *Commission Policy on Programming*, 20 Pike & Fischer, *supra*, 1901, 1909-1910 (1960); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1255; *Capital Broadcasting Co., Washington, D. C.*, 12 F.C.C. 648; *WREC Broad-*

casting Service, 10 Pike & Fischer, *supra,* 1323, 1350 (1955); *Broadcasting of Programs, Advertising Alcoholic Beverages,* 5 Pike & Fischer, *supra,* 593, 594 (1949); *The Farmers & Bankers Life Ins. Co. (KFBI),* 2 F.C.C. 455, 459; *Knickerbocker Broadcasting Co., Inc. (WMCA),* 2 F.C.C. 76, 77. In that connection, Permian, as well as other licensees, is held to a "reasonable regard for the requirements of Federal and local law." See *Application of the Northern Corp. (WMEX),* 12 F.C.C. 940, 944.

Since the Commission "may not condition" the renewal or denial of a license "upon its own subjective determination of what is or is not a good program" (*Commission Policy on Programming, supra* at p. 1907), the Commission relies on federal law or state law or even action by a state Better Business Bureau, whenever any of them is relevant, for guidance on whether a particular program, particularly an advertising program, is questionable or bad in serving the public interest of the licensee's community. See *Trinity Methodist Church, South* v. *Federal Radio Com'n.,* 62 F(2d) 850, 852-853 (C.A. D.C. 1932), cert. den. 284 U.S. 850 (Commission relied on state court statement that particular program obstructed justice); *Liaison Between F.C.C. & F.T.C. Relating to False and Misleading Radio & T.V. Advertising,* 22 F.C.C. 1572 (1957) ("Continued broadcasting by station licensees" of advertising matter found deceptive by the Federal Trade Commission "would raise serious questions as to whether such stations are operating in the public interest"; hence orders of the Federal Trade Commission will be distributed to licensees); *Public Notice on Double Billing Practices,* 23 Pike & Fischer, *supra,* 175 (laws on use of the mails and on unfair competition

referred to in considering fraudulent double billing practices); *Capital Broadcasting Co., Washington, D. C.*, 12 F.C.C. 648, 650, and *Community Broadcasting Service (WWBZ)*, 13 Pike & Fischer, *supra*, 179 (Programs on horse racing questionable if so designed as to aid to violations of state gambling laws); *WREC Broadcasting Service*, 10 Pike & Fischer, *supra*, 1323, 1350 (1955) (Efforts of State Better Business Bureau to stop "bait and switch" advertising shows licensee's carelessness in accepting such advertising); *The Farmers & Bankers Life Ins. Co. (KFBI)*, 2 F.C.C. 455, 457 (Commission relies on statement of a United States District Court that a particular program was in conflict with the ethics of the medical profession); *Oak Leaves Broadcasting Station, Inc. (WGES)*, 2 F.C.C. 298, 299-300, and *WSBC, Incorporated*, 2 F.C.C. 293, 294-295 (advertisement of patent medicine questionable because the advertiser had been convicted in state court of practicing medicine without a license and using title "Doctor" in advertisement when not licensed); *Broadcasting of Programs, Advertising Alcoholic Beverages*, 5 Pike & Fischer, *supra*, 593, 594 (1949) (Advertisement of liquor bad in localities and states where liquor sale or liquor advertisements are illegal under state law).

A questionable program so found is considered by the Commission together with all of the other factors we have indicated. Determination is then made by application of the statutory standard of "the public interest." Significantly, here, statutory "public interest" is the interest of the radio listeners. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138-139 n. 2; *Editorial-*

izing by Broadcast Licensees, supra at p. 1255; *Broadcasting of Programs, Advertising Alcoholic Beverages, supra* at p. 594; *Oak Leaves Broadcasting Station, Inc., supra* at p. 301. If the factors, other than a questionable program, are generally good, and the licensee indicates a cessation of the questioned program, the "public interest" is usually found to be served by renewal of the license. As the Attorney General has observed the Commission's only sanction against a licensee who does not operate in "the public interest" is to "withdraw his broadcasting license—a sanction so severe that it has been imposed only rarely." See *Report by the Attorney General on Deceptive Practices in the Broadcast Media*, 19 Pike & Fischer, *supra*, 1901, 1905 (1959); and see, for specific examples of the balancing process that ends with license renewal, *Capital Broadcasting Co., Washington, D. C.; Matter of McGlashan, WSBC Incorporated; Knickerbocker Broadcasting Co., Inc. (WMCA);* and *The Farmers & Bankers Life Ins. Co. (KFBI)*, all *supra*.

Such is the detail of the Commission's powers and administrative policies and decisions.[11] The Commission has not ordered Permian or any other licensee to do anything anywhere about price advertising of eyeglasses. This suffices for no preemption; for the unexercised power of a federal agency provides no conflict warranting preemption. *Panhandle Co.* v. *Michigan Com'n*, 341 U.S. 329, 336; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 187, 188; *Parker* v. *Brown*, 317 U.S. 341, 353; *Eichholz* v. *Public*

[11] We do not understand any of this to be disputed by the United States, for the same picture emerges from its brief at pp. 12-23. The difference between us is on whether it requires preemption.

Service Com'n, 306 U.S. 268; *Welch Co.* v. *New Hampshire*, 306 U.S. 9. But here where the Commission is without power there is not even a possibility under present law of any directly conflicting order in the future.

Had Permian complied with New Mexico's law, the Commission, in the light of its whole attitude of reliance on local law, would, on renewal application, certainly not find such compliance to be in violation of its duty of a reasonable effort to serve its local community with a reasonable regard for the local laws. As it stands, Permian's recalcitrance to the point of injunction may be questioned by the Commission on renewal application. If so, the Commission's decision will be based on all factors relevant to the public interest of Permian's listeners. Whatever it decides—whether to congratulate Permian on its resistance to local law (which is, in fact, unthinkable)—or whether to criticize Permian's broadcasting of Roberts' programs and so secure a cessation[28]—or whether to deny renewal—there can be no conflict with New Mexico's action within the meaning of the preemption decisions of this Court, for the federal interest is that of the listening public and New Mexico's law serves a different interest, i.e., the health of its citizens. Where the state and federal interests are different they may both validly cover the same interstate operation. *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202; *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245, 253; *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440; cf. *United*

[28] Such possible coincidence of result with the result of New Mexico's law, if it were considered as a present fact, would not require preemption. *California* v. *Zook*, 336 U.S. 725; *Gilbert* v. *Minnesota*, 254 U.S. 235; *Asbell* v. *Kansas*, 209 U.S. 251.

States v. *R.C.A.*, 358 U.S. 334.[20] Federal law in *Union Brokerage Co.* permitted an exclusively foreign commerce customs-broker to do business under a federal license for the protection of the interests of importers and exportors. Nevertheless the state validly could prohibit the broker from doing the same business unless licensed by the state in protection of its citizens dealing with the broker. In *Huron*, a state requirement in the interests of public health necessitating structural alterations in interstate ships so as to abate smoke was held not preempted by federal structural standards designed to further the federal interest in safety of navigation, even though the vessels were operating under federal licenses. Decision of no preemption here is well within *Union Brokerage Co.* and *Huron*. Such decision is even further within the Court's decisions of no preemption in the cases of asserted federal-state conflict arising under the very Act with which we are concerned. *Regents* v. *Carroll*, 338 U.S. 586; *Radio Station WOW* v. *Johnson*, 326 U.S. 120; and *Kroeger* v. *Stahl*, 248 F(2d) 121 (C.A. 3, 1957). In all of these cases state action in protection of its own interests conflicted with Commission approvals or approval

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[20] If New Mexico's interest and the Federal interest here were the same, the validity of New Mexico's action would still be well within the Court's decisions holding State action not preempted. See, e.g., *Reid* v. *Colorado*, 187 U.S. 137 (state law punishing transportation of livestock without certificate of freedom from disease *held* not preempted because federal statute punished only transportation of cattle *known* to be diseased). The case, which obviously goes much further than a decision of no preemption would require here (on the assumption of identical state-federal interests) was cited with approval in *Kelly* v. *Washington*, 302 U.S. 1, 10-11.

conditions premised on the federal public interest. In all of them, the state action was validated.[30]

The *Regents* and *Radio Station WOW* cases involved damages for breach of contract and fraud, respectively. Apparently, because of those cases, the United States suggests that Congress did not preempt traditional state powers such as those exercised in contract, torts, and fraud, and ordinary criminal jurisdiction, as distinguished from state powers exercised in the passage of health and public welfare laws. The reason for the non-preemption of the "traditional" state powers and remedies is, according to the United States, that Congress made no specific provision in the Act as to them. Congress also made no specific provision in the act as to price advertising of eyeglasses, or any kind of price advertising, or any kind of advertising. Beyond that we know of no decision or doctrine in Constitutional law upon which such a distinction between valid and invalid state action could be based. And the Government cites none.

The concession made by the United States as to the non-preemption of state cases of fraud practically concedes this case. The New Mexico statute is essentially

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[30] The no preemption decision in *Radio Station WOW* might well have meant the termination of a broadcasting station, as the Court expressly recognized (326 U.S. at pp. 131-132). Here it is questionable whether even Roberts' advertising is lost to Permian, or radio in general. Perhaps, it is unnecessary to state that *Benanti* v *United States*, 355 U.S. 96; *Western Union Telegraph Company* v. *Broglie*, 251 U.S. 315, *Postal Telegraph-Cable Co.* v. *Warren Goodwin Lumber Co.*, 251 U.S. 27, and *Charleston & Western Carolina Railway Co.* v. *Varnville Co.*, 237 U.S. 597, are all inapposite since they presented conflicts between state and federal actions in circumstances not present here.

directed at fraud, albeit in a wise and sophisticated way. See the discussion at p. 12, *supra*.

The United States also suggests a distinction between traditional remedies such as judgment for damages and, it may be, criminal conviction on the one side and injunctions on the other. The former are valid; and the latter are preempted—according to the suggestion of the United States. Again, we know of no law to support such a distinction, and the United States cites none. If New Mexico's law is valid, there is no reason for New Mexico not to use such remedy as is deemed most appropriate and most humane (as distinguished from a criminal conviction of Permian and its officers, for example) in the circumstances. The use of an injunction against a radio licensee does not of itself mean preemption. The very action upheld in *Station WOW* was a state injunction against a radio licensee. Moreover, the injunction, at least in the form of a Federal Trade Commission cease and desist order, has been a familiar weapon in the common state-federal effort against deceptive advertising. Cf. *In the Matter of Drug Research Corporation*, Federal Trade Commission, Docket No. 7179, in which the Hearing Examiner has ruled that a state criminal prosecution for the same deceptive advertisements is not preempted by a Federal Trade Commission cease and desist proceeding.

Finally, the United States suggests that affirmance here means that radio listeners in Texas as well as New Mexico will be deprived of listening to Roberts' price advertising of glasses. That they will be so deprived is doubtful. At least until stopped by Texas, Roberts can advertise on the nearby Texas radio station KTFO, at Seminole. Broadcasting Yearbook Issue, 1963, p. B-185. But reversal as to Permian here, would surely

mean that the laws of twelve states on optometric advertising which specifically apply to radio,[31] and the laws of twenty-one states on the same subject which apply to "any person" and hence to radio,[32] will be invalidated in their application to the radio media. Yet, invalidation by preemption would have to result in a discrimination in favor of radio (and television) as against newspapers and other advertising media. In any conceivable intent of Congress, there is no warrant for such a result.

Rather plainly, there is no preemption.

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[31] Cal. Ann. Code, Bus. and Professions Sec. 3000 (1962); Fla. Stat. Ann. sec. 463.11; N.H. Rev. Stat. sec. 327.20; N.J. Stat. Ann. sec. 45:12-11; N.C. Gen. Laws sec. 90-124; N. Dak. Cent. Code sec. 43-13-29 (but media not to be held liable); Okla. Stat. tit. 59, secs. 585, 943 (1961) (but media not to be held liable); Ore. Rev. Stat. sec. 683.140(6); Pa. Stat. Ann. tit. 63, 237 (Purdon); S. Dak. Code sec. 27.0707 (1960 Supp.); Tenn. Code Ann. secs. 63-815, 63-822, 63-1404; Wash. Rev. Code Ann. sec. 18.53.140.

[32] Ark. Stat. sec. 72-815 (1957 Repl.); Cal. Ann. Code, Bus. and Professions sec. 3129 (1962); Colo. Rev. Stat. sec. 102-2-17 (1953); Fla. Stat. Ann. sec. 463.14; Ind. Stat. secs. 63-1018a, 1019 (Burns 1961); Kan. Gen. Stat. sec. 65-1510; Ky. Rev. Stat. sec. 320.300; La. Rev. Stat. sec. 34.1063; Mass. Gen. Laws Ann. ch. 112, sec. 73 (A); Mich. Laws Ann. sec. 14.648 (1956); Mont. Rev. Codes sec. 66-1302 (1947); Neb. Rev. Stat. sec. 71-167 (1958); N.M. Stat. Ann. sec. 67-7-13; Ore. Rev. Stat. secs. 683.140, 683.990; R.I. Gen. Laws sec. 5-35-22 (1956); S.C. Code of Laws sec. 56-1075; Texas Civil Stat., art. 4565g; Va. Code sec. 54-396 (1950); Wash. Rev. Code Ann. sec. 18.53.140; Wisc. Stat. Ann. sec. 153.10; Wyo. Stat. sec. 33-301.

II.

NEW MEXICO'S PROHIBITION OF PRICE ADVERTISING OF EYEGLASSES AS APPLIED HERE DOES NOT VIOLATE THE COMMERCE CLAUSE

The argument by appellants (their brief, pp. 7-20) takes many directions not warranted by the facts of this case. We start, therefore, with what New Mexico has not done.

A. What New Mexico Has Not Done

New Mexico has not sought to isolate herself from her sister states either by economic barrier (cf. *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511)[33] or otherwise (cf. *Edwards* v. *California*, 314 U.S. 160). No one, whether a resident of New Mexico or not, has been prohibited from buying the glasses sold by Roberts, and taking them into New Mexico. Cf. *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Delamater* v. *South Dakota*, 205 U.S. 93, 102. On the record here there is no showing that Roberts makes any interstate sales across the state line into New Mexico, or that any such sales have been prevented, reduced, or hampered.

Since there is no showing to the contrary, it must be assumed on the record here that the revenues of appellants derived from advertising placed by Roberts, whatever those revenues may be, have not been reduced, and will not be if New Mexico's action is sustained. The burden in attacking New Mexico's action is on

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[33] However, a state may in the economic interests of its local producers, validly adopt, so far as the Commerce Clause is concerned, stabilization schemes which seriously affect extensive areas of interstate Commerce. Cf. *Cities Service Gas Co.* v. *Peerless Oil*, 340 U.S. 179; *Parker* v. *Brown*, 317 U.S. 341; *Milk Board* v. *Eisenberg Co.*, 306 U.S. 349.

appellants; and for all that appears Roberts has, and can accommodate his advertising in New Mexico, to New Mexico's law.[34]

B. What New Mexico Has Done Does Not Violate the Commerce Clause

New Mexico, in an indisputably valid exercise of her police power so far as Due Process is concerned (see the *Williamson* and other decisions of this Court, *supra*, at p. 12), has enacted a general statute applicable equally and without discrimination to all within her borders, whether engaged in interstate commerce or not. In doing so, New Mexico has sought to meet a local problem in very much the same way that most other states have (see pp. 22-23, *supra*).

Here enforcement of New Mexico's law has been by injunction—a remedy which cannot be said to be either generally inappropriate,[35] or, even less so, inappropri-

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[34] The record shows no discrimination between interstate and intrastate commerce; and none is charged. Appellants do charge discrimination between them and radio stations located outside Texas. They do not show, however, that there are any such stations broadcasting Roberts' advertisements into New Mexico. In any case, such discrimination, if there be any, is not prohibited by the Constitution. See *Packer Corporation* v. *Utah*, 285 U.S. 105, 109, which decision directly contradicts *Little* v. *Smith*, 124 Kan. 237, 257 P. 959 (1929) relied on by appellants.

[35] A number of states specifically provide for injunctions against violation of visual care statutes:

Ark. Stat. sec. 72-818 (1957 Repl.); Cal. Ann. Code, Bus. and Professions sec. 3131 (1962); Colo. Rev. Stat. sec. 102-2-21 (1953); Fla. Stat. Ann. sec. 463.19; Ind. Stat. sec. 63-1019 (Burns 1961); Ky. Rev. Stat. sec. 320.370 (1962); N.M. Stat. Ann. sec. 67-26-24; Tenn. Code Ann. sec. 63-1404; Utah Code Ann. sec. 58-1-37 (1953); Wash. Rev. Code Ann. sec. 18.34.150; Wisc. Stat. Ann. sec. 153.10 (enjoinable as a nuisance).

ate in the particular circumstances of this case. The injunction is directed solely against appellants who are resident within New Mexico, and prevents them only from accepting or publishing within New Mexico price advertising by Roberts. In other words, the injunction by its express terms is "to apply exclusively to operations wholly within the State . . . although those operations are" in part "interstate in nature." See *Aero Transit Co.* v. *Com'rs.*, 322 U.S. 495, 502; *Buck* v. *California*, 343 U.S. 99, 102; *Packer Corporation* v. *Utah*, 285 U.S. 105, 111. So far as the injunction is directed against "accepting" advertising from Roberts, New Mexico's prohibition regulates contracts locally made, whether or not Roberts telephones his advertisements from Texas as appellants assert or comes into New Mexico to offer them. Essentially such contracts are intrastate in nature. *Hooper* v. *California*, 155 U.S. 648, 654; *Delamater* v. *South Dakota*, 205 U.S. 93, 100-101.[38]

At the same time, appellants are admittedly engaged in both intrastate and interstate commerce, with how much of each not shown. Permian's broadcasts cover a local area surrounding Hobbs, and that area is divided between New Mexico and Texas. Head's interstate operation is not shown to be anything more than the minimal amount suggested by the record. In the absence of proof to the contrary by those who carry the burden of showing an invalid application of New Mexico's law, that part of Head's operation which is

[38] This is not to say, of course, that for other purposes and in other circumstances not present here, such contracts could not be part of the flow of interstate commerce. Cf. *Lorain Journal* v. *United States*, 342 U.S. 143.

in interstate commerce is safely assumed on the record here to be insignificant.

The injunction, as an effect of its application to "accepting" the advertisements by Roberts, and even more so as an effect of its application to "publishing" the advertisements by Roberts, stops the intrastate broadcasting as well as an interstate broadcasting of those advertisements into that part of the local area which is in Texas, and stops the carrying of the Roberts advertisements in the Hobbs Flare in New Mexico, as well as in that part of the local area which is in Texas, and to some undefined, but obviously small extent, in other states. Just how much publication, which is at least technically of an interstate nature, is stopped by the injunction does not appear. Appellants have not shown that Roberts places a forbidden advertisement more than once a week, or even once a year. Neither have they shown the magnitude of the forbidden advertisements. They cannot be assumed to loom large in appellants' operations; and on the record here, the forbidden advertisements considered as part of the national commerce are rather clearly *de minimis*.

So far as appears here, the injunction will not result in a net loss to the national commerce. On the contrary, the substitution of allowable advertisements for those forbidden will be beneficial and cleansing to interstate commerce, for the New Mexico statute is essentially directed to the protection of the public (see p. 12, *supra*).

As we have already shown (pp. 16 to 18, *supra*), the injunction does not, under the decisions of the Court, unconstitutionally affect such uniformity as the Commerce Clause requires in this field.

Viewed from the viewpoint of New Mexico, that State has legitimate interests to be protected by the injunction. While New Mexico has not sought to forbid the purchase of glasses sold by Roberts, she has a legitimate interest in protecting her citizens from the advertisements which characterize the business of the quack and charlatan, at least so far as they are published and broadcast within her own borders. And New Mexico has a further interest in preventing so far as she can the deleterious and discouraging effect upon the maintenance of professional standards within her own borders that Roberts' non-professional advertisements have when published and broadcast in New Mexico. Cf. *Carter* v. *Virginia*, 321 U.S. 131 (Virginia's regulation of interstate traffic through her state to prevent violation of her own liquor law *held* valid).

Each case in relation to the Commerce Clause must be decided on an evaluation of the circumstances presented. The foregoing are the circumstances here. They compel a determination of validity. New Mexico's action, otherwise a valid exercise of the police power in amelioration of a local problem, is applied evenhandedly to intrastate commerce and interstate commerce alike, and is not shown to conflict with federal law or prejudice such uniformity as may be required. Such state action is valid—even though applied to the interstate operations of a business engaged in both interstate and intrastate operations,[37] which is the fact

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[37] *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (Detroit's smoke ordinance upheld as applied to interstate shipping); *Buck* v. *California*, 343 U.S. 99 (Local drivers' permit requirements upheld as applied to through foreign commerce); *Breard* v. *Alexandria*, 341 U.S. 622 (Local ordinance regulating door to door solicitation upheld as applied to solicitors for national magazines);

here—even though applied to a purely interstate business,[38] which is not the fact here—even though the state action by its very terms can only be applicable to interstate commerce,[39] which is not the fact here—and even when large areas of the national commerce are substantially affected,[40] which is not the fact here. The validity of New Mexico's action is all the more certain

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mostly engaged in arranging interstate trips, upheld); *S.C. Hwy.* v. *California* v. *Zook*, 336 U.S. 725 (state regulation of travel bureau, *Barnewell Bros.*, 303 U.S. 177 (state weights and widths statute upheld as applied to interstate commerce); *Packer Corporation* v. *Utah*, 285 U.S. 105 (state prohibition of advertising of tobacco products upheld as applied to national advertising concern); *Railway Express* v. *New York*, 336 U.S. 106 (local ordinance prohibiting advertisements for others on trucks upheld as applied to interstate trucks).

[38] *Aero Transit Co.* v. *Com'rs.*, 332 U.S. 495 (state tax on trucks using state highways as applied to a trucking concern engaged solely in interstate trucking); *California* v. *Thompson*, 313 U.S. 109 (state regulation of persons arranging for motor vehicle transportation upheld as applied to a person who arranged interstate trip; and *DiSanto* v. *Pennsylvania*, 273 U.S. expressly overruled); *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202 (state licensing as applied to customs-broker engaged exclusively in foreign commerce).

[39] *Carter* v. *Virginia*, 321 U.S. 131 (state regulation of interstate trucking of liquor through the state upheld); *Clason* v. *Indiana*, 306 U.S. 439 (state prohibition against interstate carriage of animal corpses on its highways upheld); *Ashell* v. *Kansas*, 209 U.S. 251 (state regulation of cattle importation from out of the state upheld).

[40] For example, *Parker* v. *Brown*, 317 U.S. 343 (California's stabilization's scheme affecting most of the national commerce in raisins upheld); and *Milk Board* v. *Eisenberg Co.*, 306 U.S. 349 (stabilization scheme of large milk exporting state upheld as applied to company which bought milk solely for interstate export).

because the interstate commerce it affects is local in character and confined to Hobbs and its outlying area which is only fortuitously divided by a state line. See *Buck* v. *California*, 343 U.S. 99, 102 (Local ordinance requiring drivers' permit upheld as applied to taxicabs engaged in through foreign commerce); cf. *Omaha Street Ry.* v. *Interstate Commerce Commission*, 230 U.S. 324, 336 (Interstate Commerce Act held not to apply to a street railroad running between the two neighboring communities separated by a state line).[41]

In some of the cases we have cited, the state statute was expressed in terms of prohibition; and in others in terms of regulation. The difference is more semantic than real for, as the Court has observed, "regulation necessarily has elements of prohibition." See *Breard* v. *Alexandria*, 341 U.S. 622, 641.

Williamson v. *Lee Optical Co.*, 348 U.S. 483, which upheld Oklahoma's prohibition of all optometric advertising, supports a determination here of no violation of the Commerce Clause. The complainants in *Williamson* alleged that they advertised "in newspapers,

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[41] In view of the Court's decisions upon which we rely, *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959 (1929), and *State* v. *Salt Lake Trib. Pub. Co.*, 68 Utah 87, 249 Pac. 479 (1926) (state prohibitions of cigarette advertising held invalid as applied to large local publishers) differ from this case on their facts and are wrong in principle. *Post Print'g. & Publishing Co.* v. *Brewster*, 246 Fed. 321 (D.C. Kans., 1917) deals with the problem of a state advertising prohibition as applied to an out-of-state publisher. The question is not presented here. Appellants also rely on *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, and *Crutcher* v. *Kentucky*, 141 U.S. 47. Those cases invalidated state regulations which would basically change the whole of large interstate operations. No such facts are present here.

magazines, by radio, television and by other media of publication" (Record in *Williamson*, Nos. 184, 185, October Term, 1954, p. 6) and on that basis expressly claimed violation of the Commerce Clause (id., p. 10). The evidence at trial showed advertising by newspaper and radio (id., pp. 211, 218). And in this Court, the interstate commerce issue so raised was briefed by the parties, and by us as *amicus curiae*. See *Williamson*, Reply Brief for Attorney General of Oklahoma, pp. 18 to 19; Brief for Lee Optical Co., pp. 71 to 75; Brief for the American Optometric Association, Inc., as *amicus curiae*, pp. 44 to 47. The Court's opinion made no express reference to the interstate commerce point. However, in the light of the persuasive nature of the decisions on which we rely, the Court's concluding statement in *Williamson* (348 U.S. at 490) that it saw "no constitutional reason" for invalidating Oklahoma's action takes an added significance in its application to the interstate commerce issue which was unquestionably presented for decision.

As our country increases in population and as transportation and intercommunication are eased and speeded, the activities of our people become more and more interdependent and complex. So the Commerce power of Congress grows; and the problems of scarcely any hamlet are beyond its reach. At the same time, the ability of Congress to cope with the essentially local problems of our hamlets, communities, and states is limited, and less and less adequate for the magnitude of the task. Doubtless for reasons such as these, the Court's decisions under the Commerce Clause from *Cooley* v. *Board of Port Wardens*, 12 How. 299, to date have been increasingly permissive of non-discriminatory state action taken in the absence of conflicting

federal law. Until Congress acts, evils, abuses, and problems connected with both intrastate and interstate commerce would go unremedied and unresolved, if the states could not act. And so it is here. It is doubtful that Congress will ever legislate specifically with respect to optometric advertising, or professional advertising. At least until Congress does, the action of New Mexico under review here should be permitted to stand as being rationally calculated to aid enforcement within New Mexico of her constitutionally valid plan for the better health of her people, and this applies with equal force to other statutes relating to medicine, dentistry, and other health professions.

III.

NEW MEXICO'S PROHIBITION OF PRICE ADVERTISING AS APPLIED HERE DOES NOT VIOLATE THE FIRST AMENDMENT

Appellants' jurisdictional statement presented no question as to the First Amendment.[42] However, since the Court may consider the issue we cover it here.

New Mexico's action is directed to the purely commercial advertising offered by Roberts.[43] Nothing else is presented here.[44] In the circumstances of this case,

[42] In the jurisdictional statement and in the lower courts, appellants urged deprivation of property without due process of law, which they now say is the same as infringement of a free press. Brief for the Appellants, p. 34 n. 18.

[43] Contrast *Near* v. *Minnesota*, 283 U.S. 691, which concerned an injunction against dissemination of opinion.

[44] So the Court is not concerned in this case with advertising that mixes merchandising with opinion. See *Valentine* v. *Chrestensen*, 316 U.S. 52, 55; and cf. *Hoffman* v. *Perrucci*, 117 F. Supp. 38 (E.D. Penn., 1953), app. dismissed 222 F.(2d) 709 (C.A. 3, 1955); *United States* v. *American Machinery Co.*, 116 F. Supp. 160 (E.D. Wash., 1953); *People* v. *American Automobile Insurance Company*, 132 Cal. App. (2d) 317, 282 Pac. (2d) 559 (1955).

such commercial advertising is not protected by the First Amendment. *Valentine* v. *Chrestensen*, 316 U.S. 52; see *Martin* v. *City of Struthers*, 319 U.S. 862 n. 1; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 110-111; *Jamison* v. *Texas*, 318 U.S. 413, 417; *Town of Green River* v. *Fuller Brush Co.*, 65 F(2d) 112 (C.A. 10, 1933); *Pollak* v. *Public Utilities Commission*, 191 F(2d) 450, 457, (C.A. D.C. 1951) rev'd on other grounds, 334 U.S. 451.[45] There is no question here of a tax on commercial advertising that could destroy or is designed to destroy the business of Head and Permian so as to prevent their dissemination of public opinion. Cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233.

Since there is no First Amendment protection, any question as to prior restraint by injunction is beside the point. Indeed, if the First Amendment had some application here, it would be very late in the day to urge that the advertising practices which characterize the quack and the charlatan (See *Semler* v. *Dental Examiners*, 294 U.S. 608, 612) cannot be enjoined. There is the whole of the familiar history of cease and desist orders by the Federal Trade Commission against deceptive and misleading advertisements. See, e.g. *E. F.*

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[45] If the First Amendment were in any way applicable to the purely commercial advertisements of Roberts, a balancing of the interests of appellants against those of New Mexico would lead to affirmance here. The interests of appellants are confined to financial interests, and even those interests are not shown to be hurt. New Mexico's interest is not less than the health of the residents of her State. Further, New Mexico represents here the identical interests of many of her sister states (see pp. 22-23 *supra*) who have met the same problems of health by similar laws directed against optometric advertising.

Drew & Co. v. *Federal Trade Commission*, 235 F.(2d) 735 (C.A. 2, 1956). Even where opinion or art is concerned, and so long as other constitutional requirements are met, there is "no absolute freedom to exhibit, at least once, any and every kind of motion picture." *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 46. And like the anti-trust injunction upheld against the newspaper in *Lorain Journal* v. *United States*, 342 U.S. 143, 155, "the injunction" here "applies to a publisher what the law applies to others." In short, the fact that appellants in other aspects of their business disseminate opinion does not confer upon either of them a right to be "free from state regulation or free to manage essentially local aspects of its business as it pleases." Cf. *Panhandle Co.* v. *Michigan Com'n.*, 341 U.S. 329, 337; *Scripps-Howard Radio* v. *Comm'n.*, 361 U.S. 4, 14.

CONCLUSION

The judgment of the Supreme Court of New Mexico should be affirmed.

Respectfully submitted,

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APPENDIX

Section 67-7-13, New Mexico Statutes Annotated, 1953 Compilation:

"67-7-13. Offenses-Penalties.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than $50.00 nor more than $200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not less than 90 days nor more than (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

(a) The practice of optometry, or an attempt to practice optometry without a duly authorized certificate of registration as an optometrist issued by the New Mexico state board of optometry as provided in this act (67-7-1 to 67-7-14), and signed the president and secretary of said board.

(b) Permitting any person in one's employ, supervision or control to practice optometry unless that person has a certificate of registration, as provided in this act.

(c) Obtaining, or attempting to obtain, a certificate of registration to practice optometry unless that person has a certificate of registration, as provided in this act.

(d) The making of a willfully false oath or affirmation whenever an oath or affirmation is required by this act.

(e) Falsely impersonating an optometrist of like or different name.

(f) By selling or fraudulently obtaining any optometry diploma, license, record or certificate or aiding or abetting therein.

(g) Using in connection with his name any designation tending to imply that he is a practitioner of optometry, if not the holder of a certificate of registration under the provisions of this act.

(h) Practicing optometry during the time his certificate of registration shall be suspended or revoked.

(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

(j) Except licensed and registered optometrists and licensed and registered physicians and surgeons, having possession of any trial lenses, trial frames, graduated test cards or other appliances or instruments used in the practice of optometry for the purpose of examining the eyes or rendering assistance to anyone who desires to have an examination of the eyes, or selling lenses or duplicating or replacing broken lenses in spectacles or eyeglasses, except upon the prescription of a regularly licensed and registered optometrist or physician and surgeon.

(k) The making of a house to house canvass either in person or through solicitors or associates for the

purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers.

(m) Advertising by any means whatsover the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings on which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

(n) The violation of any of the provisions of this act for which the penalty has not been elsewhere provided in this act."